

No. 15,986

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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ELRICK RIM COMPANY, a copartnership  
consisting of M. C. Elrick and M. B.  
Champlin,

*Appellant,*

vs.

READING TIRE MACHINERY Co., INC., a  
corporation, and RALPH R. READING,  
an individual,

*Appellees.*

**REPLY BRIEF ON BEHALF OF APPELLANT,  
ELRICK RIM COMPANY, A COPARTNERSHIP CONSISTING OF  
M. C. ELRICK AND M. B. CHAMPLIN.**

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**PRELIMINARY.**

To simplify the issues for the Court, we find it necessary to reply briefly to Reply Brief On Behalf Of Appellees, Reading Tire Machinery Co., Inc., A Corporation, And Ralph R. Reading, An Individual.

**APPELLEES' ARGUMENT THAT THE PRIOR ART ESTABLISHED  
ONLY "DIP-AND-DAB" PROCESS IS CONTRARY TO THE  
EVIDENCE.**

Appellees are completely in error when they represent to this Court that at the time Reading filed his applica-

tion for the patent in suit the only method of applying rubber cement to a tire carcass to hold the camelback in place during retreading was the "Dip-And-Dab" process. In making this contention, Appellees ignore the prior use process of Cahill and Hartman, where rubber cement was sprayed on tire carcasses for holding the camelback on a tire, and prior use by appellee, Ralph R. Reading, that began in December 1951, wherein a process was used substantially identical to the patented process.

On cross-examination Reading made this admission with respect to this prior use:

"Q. As I understand your testimony now, Mr. Reading, from some time in 1951 continuously down to the present time you have been using a spray method in applying cement to buffed tires in your shop?

A. Yes. There was a period when I first started that we stopped it long enough to determine whether or not this spray method was going to work on the first three tires that we turned out that way, and after we had determined that they were good, safe sprayed tires, we have sprayed cement continuously since that time." (R. 350-351.)

It should be pointed out that in the above-quoted testimony Reading admitted that the tires retreaded employing this spray method of applying rubber cement "were good, safe sprayed tires".

This Reading prior use was more than an experiment. Reading so testified on cross-examination at R. 352, where he said:

"Q. Yes. Now, as I understand it, how long was that particular process that you have just described used? From 1951 to when?

A. We used it up until about—except for experimental, to which I have previously testified, we used that continuously up until some time in September, I believe, of—well, let's say August or September of 1953. It might even have been up into October.

Q. Then during all of that time all of the tires that were retreaded in your shop used this particular spray method of applying the rubber cement, from 1952 down until September, or thereabouts, in 1953?

A. Yes.

Q. And how many tires a month do you retread in your shop on an average?

A. Oh, on the average, oh, three to four hundred."

The prior use by Cahill overcame all of the objections of the prior paint-brush application of rubber cement. Cahill testified that the tires retreaded by his method were satisfactory, that said method saved material, eliminated the necessity of a drying room, camelback was applied to the tires immediately, better bond between tire and camelback resulted and elimination of fire hazard. Cahill's testimony in this regard is as follows:

"Q. State whether or not there were any benefits in using your new method in spraying rubber cement on tires during the retreading process over the former method of painting the tire with a rubber cement by brush?

A. There was many advantages in spraying the cement applied by a brush. My invention saved a lot of cement applied by a brush. My invention saved a lot of space in the recapping plant due to the fact that it eliminated the drying room, which was dust proof and tires would hang in there and dry for 45 minutes to an hour before the camelback was applied, but with this method of mine in spraying cement on the camel-

back was applied immediately after the cement was sprayed on. By spraying the cement on they could get more work through their molds in a day. It also gave a better bond between the old carcass and the new rubber that was being vulcanized on the tire. The strength was much more. It eliminated a lot of headaches the recapping industry was experiencing. It saved them a lot of money and time and is the only thing that has been done in the recapping industry for many years that enabled them to do a better job at less cost.

Q. Would you state whether or not there was any material saving?

A. There was about a seventy-five (75) per cent of the material saving in this method of spraying cement of mine.

Q. Would you state whether or not there was any reduction in the fire hazard?

A. It was found that it was much safer than the old method of the open bucket. We made tests by using torches in the spray pattern and it was hard to ignite the cement and it was hard to ignite the cement after it had been applied to the tire." (R. 646-647.)

The Cahill prior use also sprayed a thin film of cement on the tire; Cahill so testified at R. 660-661 on cross-examination, where he said:

"Q. So, your method comprises spraying on a rather heavy coat and breaking it up with brushes in the solvent?

A. My method teaches you can put on a thin film of cement. If you just imagine how you have to change something over that has been practiced for years and years, how hard it is to turn a man right around in the way he has been taught to do some-



thing and the brushes assisted me in bringing about the spray method. I hope I'm clear on that."

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**THERE WERE NO "SPRAY PROBLEMS" ENCOUNTERED  
IN THE CAHILL AND HARTMAN PRIOR USES.**

There is not one iota of evidence that the Cahill prior use resulted in the cobwebbing of the rubber cement or that settling or separation of cement solids posed any problem. As is pointed out above, the Cahill spray process saved material, put on a thin coating of cement, and eliminated fire hazard.

Reading, on cross-examination (R. 356), admitted that the best way to avoid cobwebbing was to thin the rubber cement with solvent, stating:

"Q. Isn't the best way to stop cobwebbing by thinning the solution?

A. That is a great help.

Q. That is the best way to do it, and if you have cobwebbing, the best thing to do and the first thing to do would be to thin your solution, wouldn't it, with more solvent?

A. Yes, sir; providing you didn't get beyond where the material would be good and tacky on your tire. You have to have a relation between the two." (R. 356.)

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**READING'S ACHIEVEMENTS ALL FOUND IN PRIOR USES.**

Reading's patented process achieved no results that are not found in the Reading prior use or in the Cahill and Hartman prior uses. For example, the above-quoted testimony of Cahill establishes that they sprayed a substan-

tially dry thin coat of cement, eliminated drying time, revised the theory of the prior paint method and provided a firmer bond. No proof was made on cross-examination of this witness that they were troubled by cobwebbing or separation of solids; the only evidence is that the Cahill process was completely satisfactory.

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**IF READING'S INVENTION WAS THE PRODUCTION OF A NON-FLAMMABLE SPRAY, SUCH A SPRAY SHOULD HAVE BEEN CLAIMED.**

Appellees contend that one of the most important features of the Reading patented process is that it produces a nonflammable spray. The nonflammability of the spray is not claimed. As a matter of fact, the claims of the Reading patent cover a flammable spray. This subject is fully covered in appellant's opening brief, pages 30 to 32, and the Court is respectfully referred thereto.

Appellees cite the new patent statute, 35 U.S.C. Sec. 100, to the effect "that the term 'process' in patent law includes 'a new use of a known \* \* \* machine'." We submit that appellant did not make a new use of a known machine but merely made an analogous use of a known machine. So far as Reading's contribution is concerned, spray painting was old; spraying rubber cement on tire carcasses was old and the method of so spraying was old. Reading merely took an old paint spray pot and employed it to spray rubber cement. The process employed by Reading was inherent in the operation of the old paint spray pot. The only thing Reading did was to adjust air pressures, and such adjustment of air pressure is within the skill of any mechanic in the art. As a matter of fact, the

claims of the Reading patent do not specify any particular air pressures. Mr. Stringfield, Appellee's expert, admitted on cross-examination, that one skilled in the art would know how to adjust pressures within the limits of the apparatus being used. His testimony appears at R. 431 and is as follows:

“Q. You still haven't answered my question, Mr. Stringfield. I said, and I asked you if it is not a fact that a person skilled in the art of spray painting, or using a spray gun, can adjust pressures and adjust the amounts of fluid for the occasion for which he desires to do that spraying?”

A. He can make all the adjustments within the limits of his apparatus, yes.”

The Court of Appeals for the Seventh Circuit has recently ruled on this question in the case of *B. & M. Corporation v. Koolvent Aluminum Awning Corporation of Indiana*, 118 U.S.P.Q., 191, 194, where it said:

“Invention does not consist in the mere conception of applying an old device to a new use if the new use is so analogous to the old that the thought of adopting the device and applying it to the new use would occur to one skilled in the art and seeking to devise means to perform the desired function. Nor is invention involved in such a case even though some changes or modifications are necessary to the practical application of the device to the new use. *Concrete Appliances Company v. Gomery*, 1925, 269 U.S. 177, 185; *International Steel Wool Corporation v. Williams Co.*, 6 Cir., 1943, 137 F. 2d 342, 346, 58 USPQ 372, 376.”

Also the Fifth Circuit discussed this question in the case of *The Fluor Corporation, Ltd. v. Gulf Interstate Gas Company*, 119 USPQ 1, 3, stating:

“It is not invention to use an old process or an old machine for a new and analogous purpose. Here the use of the old device was analogous to its former use, was taught in the prior art, and produced only the result which might have been anticipated. It did not involve an exercise of the inventive faculty. That conclusion is not negatived by evidence of unsuccessful efforts upon the part of a few others not shown to be familiar with the specific prior art, nor can commercial success supply the lack of invention.”

The Court of Appeals for the Second Circuit has also recently ruled on the question of new use in the case of *Zoomar, Inc. v. Paillard*, 118 USPQ 392, 394-395 (August 18, 1958), stating:

“\* \* \* Invention is more than recognition of latent qualities in prior art without any physical or objective change in that art. *General Elec. Co. v. Jewel Incandescent Lamp Co.*, 326 U.S. 242, 67 USPQ 155; *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U.S. 11; and see dissenting opinion of L. Hand, J., *Jungersen v. Baden*, 2 Cir., 166 F. 2d 807, 811, 76 USPQ 488, 491, quoted in dissenting opinion of Frankfurter, J., *Jungersen v. Ostby & Barton Co.*, 335 U.S. 560, 568, 80 USPQ 32, 35. \* \* \* For it is ‘settled law beyond the need of citation that the adaptation of a machine for a new use does not entitle one to a patent if the idea of the new use is suggested by analogous art and invention may not be perceived in the adaptation,’ *Buffalo-Springfield Roller Co. v. Galion Iron Works Mfg. Co.*, 6 Cir., 215 F. 2d 686, 688, 103 USPQ 72, 74-75.

And since the Patent Office did not consider the Michel and Richter disclosers when it approved plaintiff’s application, there can be no strong pre-

sumption of validity from its action. See *Georgia-Pacific Corp. v. United States Plywood Corp.*, 2 Cir., 118 USPQ 122.”

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**APPELLEES ARE IN ERROR CONTENDING THAT READING'S EMULSION STEP IS NEW, CLEAR, INVENTIVE AND INFRINGED.**

It is believed that the contention raised by Appellees in their reply brief that the emulsion step is new, clear, inventive and infringed is fully answered in appellant's opening brief, pages 53 to 66. In this section of our opening brief it is pointed out that to form his emulsion, Reading added to his prior process an air inlet tube that terminated adjacent to the bottom of his tank—an expedient old in the art as shown in the prior patents to Shelburne, Gradolph or McLean, et al. An important factor with respect to these patents is that no one of said patents was considered by the Patent Office during the prosecution of the Reading application in the Patent Office. This addition would be within the skill of any mechanic in the art.

The Supreme Court in the case of *Cuno Engineering Corporation v. Automatic Devices Corporation*, 314 U.S. 84, 62 S. Ct. 37, 41, in passing on skill of the art, said:

“\* \* \* A new application of an old device may not be patented if the ‘result claimed as new is the same in character as the original result’ (*Blake v. San Francisco*, 113 U.S. 679, 683, 5 S. Ct. 692, 694, 28 L. Ed. 1070) even though the new result had not before been contemplated. *Pennsylvania R. R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U.S. 490, 494, 4 S. Ct. 220, 222, 28 L. Ed. 222, and cases cited. Certainly the use of a thermostat to break a circuit

in a 'wireless' cigar lighter is analogous to or the same in character as the use of such a device in electric heaters, toasters, or irons, whatever may be the difference in detail of design. Ingenuity was required to effect the adaptation, but no more than that to be expected of a mechanic skilled in the art."

Also, in *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp. et al.*, 340 U.S. 147, 71 S. Ct. 127, 130, the Supreme Court, discussing the same subject, said:

"Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men. This patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them in congregation as a monopoly."

Passing now to the question of infringement, again we refer the Court to appellant's opening brief, pages 57 to 66, where this question is fully considered.

Appellees, on pages 14 to 16 of their reply brief, in an attempt to establish infringement, have completely misconstrued and misinterpreted the testimony of the witness Petersen. They endeavor to mislead by contending that Petersen admitted that in the Elrick process there is a

supersaturation of air in the cement. This is not so and Petersen did not so testify.

Appellees quote certain of Petersen's testimony, leaving out the prior related testimony. Appellees quote the following testimony (R. 519):

“Q. Yes. So that when you dropped it to 10 pounds, you would then have supersaturation at 10 pounds?”

A. Presumably, yes.”

The true context of this testimony is as follows:

“Q. (By Mr. Herzig): Now, you say that in Reading—in the Reading apparatus, following the teaching of Reading, upon release—first, upon saturation of the material with air by bubbling, then the release of that pressure, you had a supersaturated atmosphere as well, is that correct, in the cement—that you have supersaturation in the cement?”

A. We did not have saturation, I am sure, because 10 seconds would not be long enough to make saturation, but there would probably be a solubility in excess of that at 10 pounds per square inch.

Q. Yes. So that when you dropped it to 10 pounds, you would then have supersaturation at 10 pounds?”

A. Presumably, yes.” (R. 519.)

Dr. Petersen, at R. 519 (testimony above-quoted), where he was asked the question respecting supersaturation and answered, “Presumably, yes”, was discussing a test employing the Reading process where the initial pressure was 40 pounds and this initial pressure was dropped to 10 pounds. There is no release of pressure (as indicated in said prior question) in Elrick but only a constant pressure of 10 pounds.

No witness testified that at any time, in the Elrick process, you have a supersaturation of the cement with air. Mr. Stringfield, appellees' expert, at R. 444-445, admitted that Elrick did not form a cement supersaturated with air, stating:

“Q. So, as I understand your answer now, there would be no supersaturation in the Elrick tank?”

A. Presumably in the tank itself there might not be supersaturation.

Q. There would not be supersaturation, that is the fact, isn't it?

A. Yes, I think you are right there.”

Appellees, page 15 of their reply brief, made a great “to do” over the fact that in the tests run by appellant, they passed air through the cement in the Elrick tank for two minutes. Appellees claim that the tests were rigged. Appellees, in so contending, refuse to give the instructions for use of the Elrick device (Ex. 8, R. 833) their proper scope. These instructions say: “Allow air to pass through tank for *about* 3 minutes . . .”. The instructions do not make it mandatory that air be passed through the tank for 3 minutes but only *about* 3 minutes and, we submit, 2 minutes falls within the scope of this language.

Again, on page 15 of appellees' reply brief, they say: “Also, that saturation at any given pressure gives supersaturation at a lesser pressure, e.g., at the nozzle of the spray gun.” Reading can make no claim to said function of the nozzle of the spray gun. In the use of any pressure spray gun, the fluid at the nozzle of the spray gun is reduced, atomized and mixed with a large volume of air. Whether the fluid at the nozzle is supersaturated or not makes no difference because the amount of fluid sprayed



is so minute that air entrained in the fluid would have little or no effect. Dr. Petersen so testified at R. 513, where he said:

“Q. From the tests that you witnessed, would the dispersion of the entrained air in the fluid in the tank have any effect on the spraying characteristics of the cement?”

A. I would say that the amount of air in the independent stream is so much greater than the amount of air that is entrained in the form of small bubbles in the cement, that when the cement meets this blast of independent air, there could be little or no effect of the small bubbles in the cement on the characteristics of that spray.”

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**PUBLIC USE BY READING, CAHILL AND HARTMAN  
WAS CLEARLY ESTABLISHED.**

It is submitted that the record of this case establishes without any doubt that Reading, Cahill and Hartman practiced methods of spraying rubber cement on tire carcasses substantially identical with the patented process, long prior to one year before Reading filed his application for Letters Patent. The Court is respectfully referred to the discussion of prior uses in appellant's opening brief, pages 41 to 46.

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**ATTORNEYS' FEES ARE UNWARRANTED.**

It is believed that appellant's opening brief fully discusses the question of attorneys' fees and the Court is referred to pages 66 to 70 of said brief.

WHOLESALE NOTIFICATION OF INFRINGEMENT  
NOT JUSTIFIED.

Appellant has no quarrel with appellees when they contend that they are entitled fairly to notify infringers. However, when appellees sent out notices of infringement to some seventy-eight distributors and jobbers of tire retreading machinery (R. 602), thereafter published a notice in a trade journal threatening every distributor, jobber and user of spray equipment with patent infringement (R. 231), and then did nothing to pursue their rights, we consider it unfair. If appellees had pursued their right and filed a suit for infringement, showing their good faith, appellant would have no complaint.

As the Court said in *United States v. Patterson et al.*, 205 F. 292, 299:

“\* \* \* A patentee may properly warn the offending competing manufacturer, and may call attention to his patent and his claim of infringement; but when he threatens suit and does not bring it, or engages in acts of unfair competition, a court of equity will say to him:

‘Hold your hand; if you really have a patent, if the competitive concerns of which you complain are really infringing your patent, take the method the patent law has given you of establishing your monopoly by excluding your competitors, by enjoining them or seeking damages in the courts of the United States; otherwise, you interfere with your competitors’ business at your peril.’ ”

**PRESUMPTION OF VALIDITY DESTROYED WHEN BEST ART  
NOT CITED BY PATENT OFFICE.**

It is submitted that the law is clear that the presumption of validity is destroyed when the best art is not considered by the Patent Office.

This Court of Appeals has many times followed this rule. For example, in the case of *Gomez v. Granat*, 177 F. 2d 266, 268, this Court said:

“None of these prior patents were cited or considered by the patent office during the prosecution of the patent application for the Granat patent. In this situation it is argued that the presumption of prima facie validity is greatly weakened if not destroyed when pertinent prior art is not cited or considered by the patent office, and this court has so held. *Stoddy v. Mills Alloys*, 9 Cir., 67 F. 2d 807; *Mettler v. Peabody Engineering Corp.*, 9 Cir., 77 F. 2d 56; *McClintock v. Gleason*, 9 Cir., 94 F. 2d 115.”

See also:

*Jacuzzi Bros., Inc. v. Berkeley Pump Co.*, 9 Cir., 191 F. 2d 632;

*Syracuse v. Paris*, 9 Cir., 234 F. 2d 65.

There is no question but that the best art was not considered by the Patent Office. For example, the prior patents to Shelburne, Gradolph and McLean, et al., and the prior uses of Reading, Cahill and Hartman were not considered by the Patent Office during the prosecution of the Reading patent application. Thus, we submit that the presumption of validity of the Reading patent in suit is destroyed.

If, as stated by appellees (page 32, appellees' reply brief), nonflammability was one of Reading's greatest

contributions, why do the Reading claims cover both flammable and nonflammable sprays? This subject is fully discussed in appellant's opening brief, pages 30 to 33.

With respect to precipitation of solids, if mere agitation of the fluid in the tank accomplishes this, as Reading contends by charging Elrick with infringement, then Reading contributed nothing in the art, for this step is old. For example, the prior art patents to Shelburne (Ex. 4, R. 765), Gradolph (Ex. 4, R. 753) and McLean, et al. (Ex. 4, R. 759) teach the identical agitation employed by Elrick, and the patents to Barton (Ex. 4, R. 780), Paasche (Ex. 4, R. 785), Seweryn (Ex. 4, R. 791), Kline (Ex. 4, R. 795), Davis (Ex. 4, R. 818) and McIntosh (Ex. 4, R. 8291) also disclose agitation of a fluid in a spray device by passage of air through the fluid in a tank. There was nothing new in Reading in this step of his process.

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#### **THE CHARACTER OF THE WITNESSES.**

There was no substantial conflict in the testimony. Therefore, the District Court's decision was not based upon any conflict in the testimony.

All of the witnesses testified to the facts as they believed them to be. When all of the evidence is reviewed, we believe that this Court must reach the conclusion that the patent in suit is invalid and not infringed.

**THE FINDINGS OF THE DISTRICT COURT  
ARE CLEARLY ERRONEOUS.**

As was carefully pointed out in appellant's opening brief, we believe the District Court, in preparing its findings, overlooked the state of the art at the time Reading filed his application for Letters Patent and also failed to apply the strict standard of invention applied by this Court and the Supreme Court.

We respectfully refer the Court to the complete consideration of the findings, and why they are clearly erroneous, set forth in appellant's opening brief, pages 71 to 76.

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**CONCLUSION.**

In our opening brief we very thoroughly discussed all of the defenses raised on this case. In this reply we merely answered specifically the arguments presented by appellees. To sustain appellees' contentions would be tantamount to granting to appellees, for the full term of the patent in suit, the exclusive monopoly in the use of an old, well-known paint spray pot for the spray painting of rubber cement, a process used in the art long before the Reading patent. We urge such a broad grant is contrary to law and contrary to public interest.

We further submit that the Reading process is not an invention subject to patent protection in that it does not measure up to the standard of invention as laid down by the Supreme Court and by this Court.

We further submit that the Elrick process does not infringe the claims of said Reading patent when those claims are read in light of the Reading specification.

We submit that the District Court erred as set out in the specification of errors in our opening brief, and that the judgment should be reversed.

Dated, San Francisco, California,  
October 17, 1958.

Respectfully submitted,

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